Filed 8/14/19 P. v. Dorsey CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. DARNELL DEANGELO DORSEY, Defendant and Appellant.	C084039 (Super. Ct. No. CRF 14-0000394)

A jury found defendant Darnell Deangelo Dorsey guilty of assaulting a child under eight years of age causing death (Pen. Code, § 273ab, subd. (a)) and the trial court found he had a prior strike (robbery) (*id*., §§ 211/212.5, subd. (c), 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The court sentenced defendant to prison for 50 years to life, and he timely appealed.

His sole contention on appeal is that the trial court prejudicially erred by admitting his multiple uncharged acts of domestic violence against three separate individuals under Evidence Code sections 1101 and 1109.[1]

We agree that some of the uncharged act evidence should have been excluded. But on this record, it is not reasonably probable defendant would have obtained a more favorable result had the errors not occurred. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Accordingly, we shall affirm the judgment.

FACTS

Late at night on January 22, 2014, 19-month old Cameron presented in respiratory distress. He was treated in turn by multiple first responders and hospitals, but he died three days later. Medical personnel and the police quickly focused on traumatic inflicted child abuse as the cause of Cameron's symptoms and subsequent death, and defendant was arrested.

Background

Cameron was the child of Veronica R. and her former boyfriend. Veronica had a then three-year-old son with defendant named J. Defendant lived in a trailer with Veronica, Cameron, and J. Veronica's father and his wife, Paul and Ellen, lived in the trailer park across the way.

On January 11, 2014, while at a party including a "bounce house," Cameron became upset and cried, which Ellen (who attended the party) later ascribed to prior rib breaks. At the time she noticed only that Cameron had a black eye. Later that January, both Cameron and J. fell ill with flu-like symptoms, the descriptions of which varied somewhat from one family member's testimony to another's and also varied somewhat

---

[1] Further undesignated statutory references are to the Evidence Code.

over time. But there was no dispute that Cameron had displayed objective flu-like symptoms for a few days before the night of the crimes.

Events that Night

Defendant generally watched the boys while Veronica worked, but he also attended college. Defendant got frustrated over the constraint on his freedom. On January 22, 2014, Veronica's mother Tracy watched the boys at her house until about 1:00 p.m., when defendant picked them up. Cameron's fever had run as high as 102 degrees that day, and he had vomited once. When defendant arrived, Cameron was whining; defendant yelled at him and told him to stop crying.

Between 8:00 and 8:30 p.m., Veronica finished work and returned home. She made dinner and planned to go to the gym with her aunts later. They arrived about 9:00 p.m. Both aunts testified Cameron looked sick and sluggish or tired. The women left for the gym after about an hour, but had to return briefly; at that point the boys seemed relatively fine.

Two neighbors who lived in the next trailer testified variously that they heard a "loud slam" or "loud thuds" around 11:00 p.m. that night. One of these neighbors described screaming and yelling, kids crying, and what he thought was banging on walls, and then car doors slamming.

The women returned near midnight. Defendant rushed out holding Cameron and screamed that Cameron was not breathing. Veronica grabbed Cameron, returned to the car, and got into the backseat. As an aunt drove for help, Veronica asked how to perform CPR and began compressing Cameron's chest. She saw that Cameron had blood on his mouth.[2]

---

[2] The trailer had no landline and two mobile telephones later found in the trailer did not work; defendant had no telephone at that time, but sometimes used Veronica's.

The women spotted an ambulance and an EMT and a paramedic took over Cameron's care, again performing CPR. Firefighters were called and they, too, provided medical support (including CPR) as Cameron was taken to the Sutter Davis Hospital (Sutter) emergency room, where he arrived a few minutes before midnight. On the way to the hospital, Cameron's pulse was low but it never stopped.

For some minutes at the hospital, Cameron's endotracheal tube was too low into his right lung. This meant his left lung was not getting sufficient oxygen and it collapsed, triggering a low oxygen alarm. After ascertaining the problem via an X-ray, a physician retracted the tube a couple of centimeters, which corrected the problem.

Various family members soon arrived at the hospital. Defendant arrived separately. Some relatives testified defendant seemed emotionless, and a detective agreed, although he testified defendant chuckled at one point. Paul, however, thought defendant seemed upset. Some relatives noticed that J. had a black eye which he had not had earlier, and when Tracy asked J. about it, J. put his head down. There was a confrontation between defendant, who became angry, and Tracy and her son that was broken up either by Paul, or by the police, or by both.

The symptoms Cameron presented led Sutter medical personnel to conclude he had been subjected to non-accidental trauma, and the police arrested defendant while he was at Sutter. Because of the severity of Cameron's condition and his evidently traumatic injuries, he was transferred to the UC Davis Medical Center (UC Davis), the highest-level regional pediatric trauma center. He arrived there at about 3:00 a.m. on January 23, 2014.

A number of UC Davis medical personnel either examined Cameron directly or reviewed tests and images (from Sutter and from UC Davis). They, too, concluded he had been subjected to non-accidental trauma. He was nonresponsive while there and the brain damage was deemed to be nonreversible. On January 25, 2014, life support was removed and Cameron died.

Cameron's blood was found on tissues, baby wipes, and children's clothing discovered in different parts of the trailer. There were a number of dents in the walls.

The Prosecution Experts: Infliction of Traumatic Injuries

A number of doctors who examined Cameron or his records testified his injuries were not accidental, including the Sutter emergency room doctor, a UC Davis neurosurgeon and faculty member, a UC Davis pediatric critical care doctor, a UC Davis pediatric radiologist, a UC Davis trauma surgeon, a UC Davis professor and neuroradiologist, a UC Davis pediatric clinical care doctor, and a Sutter pediatric radiologist.

The undisputed fact that Cameron had both fresh and older (healing) rib breaks, coupled with the fact that some of the breaks were toward the back (posterior) corroborated a theory of inflicted child abuse. There were fresh bruises on his back corresponding with the rib fractures. His liver damage and other internal injuries suggested he had been struck with blunt force. A blurring of the grey and white matter in the brain indicated axonal injury, typically caused by a blow causing the upper part of the brain to move away from the core, shearing nerve cells, which in turn causes brain swelling. This conclusion was corroborated by the observation of retinal bleeding by some (though not all) physicians; such bleeding was consistent with abusive head trauma. There was also evidence of head injuries, which corroborated the idea that he had suffered traumatic blows.

The treating physicians did not believe Cameron had pneumonia, although one testified she heard fluid in the lungs that in theory could have been from pneumonia. A problem with the placement of an endotracheal tube at Sutter was quickly remedied and did not contribute to Cameron's death. Cameron had low vitamin D levels, but not rickets.

It was possible the time Cameron spent on a ventilator accounted for a postmortem finding of pneumonia by Dr. Ikechi Ogan, the pathologist who performed the autopsy,

but even he thought pneumonia was not a contributing factor to death. Dr. Bennet Omalu, a forensic pathologist and neuropathologist, conducted further postmortem tissue studies, and found no pneumonia. Bruising was seen on autopsy that was not necessarily apparent earlier. Cameron also had subdural bleeding, which is consistent with being struck or with the brain striking the skull's inner surface. Dr. Ogan believed Cameron had suffered blunt force trauma to the head causing a severe brain injury. So did Dr. Omalu, who also saw evidence of inflicted trauma to the trunk and bruising on the back, and thought the various rib fractures (including posterior breaks) also indicated child abuse, as did evidence of multiple blows to the head.

Dr. Kevin Coulter, UC Davis's leading specialist in child abuse and interim pediatrics chair, believed Cameron was subjected to inflicted injuries causing death. He believed Cameron's injuries were the result of a combination of blunt force and rotational or acceleration-deceleration movement of the head. Dr. Angela Vickers, a pediatrician specializing in child abuse, agreed. She opined the cause of Cameron's injuries was blunt force (e.g. shaking) or application of blunt force to the head (e.g., slapping) or both.

Defense Experts: Death by Natural Causes

The three defense experts generally opined that Cameron had a preexisting severe vitamin D deficiency amounting to rickets, which made him susceptible to rib breaks (spontaneously such as by coughing, and by the administration--or maladministration--of CPR). Further, based on autopsy and other indicators they concluded he already had severe pneumonia (albeit then undiagnosed) on admittance to Sutter. This condition led to a respiratory arrest which in turn led to a cardiac arrest that reduced the blood flow to the brain so much so that when the heart was restarted via CPR the increased blood flow itself (reperfusion) caused still further damage to the brain. In part they pointed to evidence that a mucus plug had been removed from Cameron's lungs, suggesting this cut off his ability to breathe. Once the brain began to swell, blood flow to the brain was cut

off by the increased cranial pressure. The misplacement of the endotracheal tube contributed to the problem.

Two of these doctors were skeptical at best of "shaken baby syndrome." One noted that one of the primary researchers whose work led to "shaken baby syndrome" has since disavowed his views, and this doctor was part of a growing minority of physicians who believe that it does not exist, some of whom have been persecuted for their dissenting views. A retired emergency room doctor who practiced clinical forensic medicine, was a skeptic of the "shaken baby syndrome" and whether retinal hemorrhage and subdural hemorrhage were "diagnostic of child abuse." These doctors found no evidence of blunt force trauma.

Domestic Violence Evidence

As we discuss more fully in the Discussion, *post*, the People introduced evidence of prior domestic violence by defendant. There was vague evidence that he had choked Veronica, evidence of three incidents in which he was abusive or threatening toward his prior girlfriend during or soon after her pregnancy, and evidence that his son J. had a black eye and suspicious parallel marks on his thigh around the time of Cameron's death.

Defendant's Accounts

In a recorded conversation at the hospital, defendant told a detective that Cameron had vomited and had been sick with a fever for a couple of days, but "I didn't think anything like this would happen." Defendant ate dinner, put J. to bed while Cameron was eating, and returned to the room to find Cameron "laying out." He thought Cameron had choked on food. He yelled at Cameron and picked him up. Cameron was limp and defendant slapped him, causing the child to gasp. In a panic, defendant poured water on him and ran out to knock on a nearby door but got no answer so he returned. Defendant told the detective that he "shook the shit out of" Cameron. Defendant chuckled or laughed when he recounted slapping or shaking Cameron.

In an interrogation later that morning (after he was arrested and read his rights), defendant again admitted he both slapped and shook Cameron, causing his head to hit the ground. Defendant asked if he was in trouble because he put water on Cameron and said "I would never hurt him. I've never done anything except for just normal hand whoopin's and butt whoopin's," which he defined as "not even enough to leave a mark. Just simple stuff." A couple of weeks earlier Cameron had fallen down some stairs, and recently J. hit Cameron with J.'s cast (from a broken wrist from falling).

When told that Cameron had broken ribs, new and old injuries, brain swelling, and retinal bleeding, defendant asked what could cause those injuries; when told they were "from shaking a baby" he said "No. It was an accident. I swear to God." When defendant was told he would be asked about every injury starting with old and new broken ribs, defendant suggested Cameron's father (allegedly a gang member) may have done something, but conceded the father last saw Cameron two months earlier. Defendant had slapped Cameron on the back but there was no way he broke any ribs.

When defendant was asked about other injuries he eventually said, "I don't know what could've happened to him except for his dad doing something to him in the past." Defendant also suggested J. may have hit Cameron with his cast. When asked about a lacerated spleen and bleeding on the brain and damage to internal organs defendant said "How did that happen? I didn't punch him in his stomach. Come on, now." When told the retinal bleeding had to be recent, defendant said "I agree with the thing with the eyes, like maybe I did shake him." He said he knew his limits and did not punch Cameron. When asked if he had dropped Cameron while shaking him defendant said, "Yeah, I think so." He was "pretty sure. I want to say he fell." He admitted he had punched his son J. before ("like in his arm or something"), but Veronica told him not to do that again, and he had not punched Cameron.

In a jailhouse call with his mother, defendant said, "I think I said too much." (A few days later he told her "I'm going to be in a lot of trouble man. And there's no way around it."

At trial defendant testified in a manner consistent with his statements to law enforcement. He had no explanation for J.'s black eye, Cameron's bloody lip, or why Cameron's blood was found on tissues and clothing in the trailer. He admitted lying to detectives about not taking drugs (he smoked marijuana so that he was high every day, all day), and lied to police in the past when he had been interrogated about a prior robbery case.

DISCUSSION

I

Relevant Law Regarding Admission of Section 1109 Evidence

A. *The Limited Issue is Prejudice*

Defendant does not challenge the threshold issue of admissibility of the evidence under the section 1109 definitions, but contends the evidence should have been excluded as unduly prejudicial under section 352.

B. *The Law*

The word "prejudice" in section 352 is used in the " 'etymological sense of "prejudging" a person or a cause on the basis of extraneous factors.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) It references evidence that unfairly "tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.)[3]

---

[3] Nothing in the trial record supports defendant's contention on appeal that the uncharged act evidence compelled him to testify, thereby subjecting him "to the dangers of impeachment and cross-examination."

A trial court has some latitude regarding the admission of evidence (see *People v. Fitch* (1997) 55 Cal.App.4th 172, 183 [a § 1108 case]), but once a court finds that proposed evidence falls within section 1109, the court must exercise the discretion conferred by section 352 to provide a "realistic safeguard" (*People v. Falsetta* (1999) 21 Cal.4th 903, 918 (*Falsetta*) [a § 1108 case]) against the unrestrained use of propensity evidence, subject to appellate review for an abuse of discretion. The underlying concern with propensity evidence is not that it lacks probative value, but that it is *too* probative, or may so be treated by a jury. In *People v. Harris* (1998) 60 Cal.App.4th 727 we emphasized that section 1108 "passes constitutional muster if and only if section 352 preserves the accused's right to be tried *for the current offense*. 'A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is.' [Citations.]" (*Harris,* at p. 737.) We then considered a number of factors derived from prior section 352 cases that must be realistically considered by a trial court (and on appellate review) to determine whether such evidence did or did not weaken a defendant's due process right to a fair trial. We considered: (1) the inflammatory nature of the uncharged act evidence as compared to the charged act evidence; (2) the probability of jury confusion; (3) remoteness; (4) undue consumption of time; and (5) the probative value of the evidence in light of the triable issues in the case. (*Id*. at pp. 730, 737-741.) These factors apply with equal force in a case involving the admission of uncharged domestic violence evidence under section 1109. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028-1030.)

II

Admission of Evidence of J.'s Injuries

Defendant contends the trial court prejudicially erred by admitting any evidence of J.'s injuries. He argues any bad acts against J. were unlike the alleged acts against Cameron, there was no clear evidence that defendant caused J.'s injuries, and the opinion of Dr. Vickers was speculative, as she phrased her views in terms of concerns or

suspicions. He adds there is no evidence that J.'s black eye was fresh, or that it was caused by inflicted trauma, let alone by defendant's actions.

The prosecution's written offer of proof regarding J.'s injuries alleged Dr. Vickers had evaluated J. for signs of abuse on January 23, 2014. He was wearing a cast due to two right wrist fractures, he had a black left eye, healing abrasions on both sides of his face and a bruise on the left side of his face. Vickers saw many scars and bruises on his back "and several parallel marks" on his left leg and hip. Vickers reported that the parallel marks were " 'suspicious for inflicted injury,' " more information was needed about the fracture, and the other injuries were " 'non-specific without history.' " She was expected to testify that the parallel marks "are indicative of inflicted injury to this child" and she could not rule out non-accidental injury to the face and back. In opening statements, the defense had conceded defendant was the primary caregiver for the boys while Veronica worked, and this would tend to exclude anyone other than defendant as the abuser.

A. *J.'s Black Eye*

At trial, several family members testified they had not seen J. with a black eye until he went to the hospital. When Tracy asked J. about it in the hospital waiting room, he put his head down, which was not his normal reaction to questions. When Ellen asked J. about the black eye, "He bowed his head and turned away." Contrary to defendant's view on appeal, this evidence clearly pointed the finger at defendant as the cause, although he denied it at trial.

The trial testimony tended to show J. received a black eye the same night Cameron was taken to the hospital. This evidence was highly probative on the issue whether defendant--left alone to care for two sick toddlers--for whatever reason snapped and struck each of them. It was not remote. It was not cumulative. It did not take much jury time to present. It was not inflammatory in comparison to the details about Cameron's

alleged traumatically-inflicted injuries. This evidence was admissible under section 1109 for propensity purposes; it survives the gatekeeping function provided by section 352.

B. *J.'s Parallel Marks*

Dr. Vickers specialized in pediatric abuse and neglect. When she examined J. on January 23, 2014, on the back of his left thigh she saw parallel lines running along the leg and parallel lines on the left upper thigh or hip and buttock. Vickers testified she was concerned about the parallel lines on the back of J.'s left leg and thigh, marks that commonly indicate an injury caused by a thin instrument, and testified some marks were "suspicious locations for abuse injury." She was less concerned, or not concerned, about J.'s other injuries (the broken wrist in a cast and other bruising, not relevant for purposes of our discussion here). Dr. Vickers was never asked the *age* of the parallel marks.

Veronica testified defendant was the primary caregiver for the boys in December 2013 and January 2014. The discipline she saw him impose was normal, so far as she was concerned, consisting of timeouts and non-severe spankings. She did not know how J. got the parallel marks described by Dr. Vickers, which Veronica described as scars (i.e., old).

As defendant argues, the evidence was quite vague. The prosecutor never asked a clear question soliciting a medical opinion about intentional versus accidental infliction of injury. The failure to ask clear questions produced vague answers that were not particularly probative. Further, the prosecutor never asked Dr. Vickers how *old* she believed the marks were. Thus, the jury would have to speculate that they had been inflicted (if at all) during some period in the past when defendant watched the children.

In *Falsetta*, our Supreme Court explained in part that when faced with uncharged act evidence admitted for propensity trial judges must in part consider "the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry . . . ." (*Falsetta*, *supra*, 21 Cal.4th at p. 917; see *People v. Kerley* (2018) 23 Cal.App.5th 513, 537.) Absent a preliminary showing that the

defendant committed a proffered uncharged act (here, inflicting the parallel marks) "the fact that 'somebody' did it is irrelevant. [Citations.]" (*People v. Cottone* (2013) 57 Cal.4th 269, 284; see *People v. Jandres* (2014) 226 Cal.App.4th 340, 353.) The court must first find there is a sufficient basis on which the jury could rationally find by a preponderance of evidence that the defendant is responsible for the uncharged act. (See *Cottone,* at pp. 287-290; *People v. Johnson* (2000) 77 Cal.App.4th 410, 419, fn. 6 ["neither the statute nor *Falsetta* requires prior convictions" though how the acts are proven is a factor for the trial court's section 352 analysis].) Defendant consistently argued that the evidence of parallel marks lacked a sufficient degree of certainty to meet this relatively low threshold. Once the vagueness and timing problems were revealed after Dr. Vickers testified, her testimony should have been stricken on the ground that the evidence as given was unduly confusing and lacked significant probative value.[4]

We will discuss the issue of prejudice in Part IV of the Discussion, *post*.

III

Admission of Defendant's Domestic Violence Against Girlfriends

A. *Abuse of Veronica*

Defendant contends the trial court should have excluded evidence tending to show that he had choked Veronica at some unknown point under unknown circumstances. We agree that this evidence was admitted in error as well. This evidence was not even

---

[4] We note that defendant couches his claim of error as encompassing both sections 1109 and 1101, and the Attorney General addresses it as such. But although the uncharged act evidence was originally also *admitted* to show intent and lack of accident (see § 1101, subd. (b)), the jury was ultimately *instructed* to use this evidence (if at all) *only for section 1109* purposes. Thus, any theory of admission under section 1101 was abandoned during trial. In any event, on these facts, the evidence at issue should have been excluded under section 352, for the reasons we have described, regardless of under which theory admission was sought.

included in the prosecutor's written offer of proof; instead, the prosecutor intentionally omitted it therefrom because the prosecutor thought it was too "attenuated."

But the prosecutor later tendered a convoluted and misplaced theory that the *defense* had somehow rendered the evidence admissible. The prosecutor expected Veronica to deny that defendant abused her when called to the stand, and she did. Veronica's aunt also denied any knowledge of defendant abusing Veronica. The prosecutor thought that a second aunt would testify that the first aunt had been present when Veronica said to the second aunt that defendant had choked her. In light of this, the prosecutor now wanted to call one aunt to impeach the other aunt, a defense witness, and by doing so also manage to impeach Veronica *and* have the evidence come in against defendant.

Over objection, the trial court allowed the evidence in under sections 1101, subdivision (b) and 1109. But the second aunt denied that she had told detectives that the first aunt had been present when Veronica told her defendant had choked Veronica. She did recall Veronica telling her about an argument the couple had. She had told a detective about an argument in which defendant choked Veronica, but testified she did not really know what she was talking about. On cross-examination she testified her memory of when Veronica told her about this was hazy. On redirect she remembered that the first aunt had told her about the choking and that she had related some of this to a detective.

The detective then testified, but added nothing relevant to the mix; he was not even asked about any specific incident that may have been related to him by either of the aunts or Veronica herself.

Admission of this evidence was error under any theory presented here. First, allowing objectionable evidence to be admitted without objection does not open the door to further *inadmissible* evidence. "The so-called 'open the door' or 'open the gates' argument is 'a popular fallacy.' " (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192.)

Second, this evidence was confusing both as presented and as it came to be admitted as an attempt to impeach an aunt, rather than the victim herself. Further, it had little or no probative value because at *best* it merely showed that on one past occasion defendant choked Veronica during an argument, but no surrounding context was provided, such as any dates or relevant circumstances.

It is the similarity between an uncharged act and the charged offense(s) that principally drives the question of its probative value. (See *Falsetta, supra,* 21 Cal.4th at p. 917; *People v. Kerley, supra,* 23 Cal.App.5th at p. 536; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211; see also *People v. Williams* (2018) 23 Cal.App.5th 396, 413, 420, 422.) Absent *any* factual context, the alleged choking incident bore no similarity to the charged offense; it did not even tend to show defendant had a quick temper.

Given the questions surrounding the incident and the unorthodox way the evidence came to be offered, this evidence should not have been admitted, or if admitted should have been stricken. We address the issue of prejudice in Part IV of the Discussion, *post*.

B. *Abuse of Bridget*

Defendant contends the trial court erred in allowing the prosecutor to introduce evidence that he abused his former girlfriend Bridget. We disagree.

Bridget was defendant's girlfriend between December 2010 and October 2011; she became pregnant during that time. Bridget testified defendant was quick to anger, and would restrain her when she tried to leave. She testified about three instances of what the prosecution offered as abuse, but which she herself testified did not fit her own understanding of "domestic violence."

After a medical appointment during Bridget's pregnancy, defendant did not want her to leave with a friend, and pulled Bridget from her friend's car, then drove fast with her in his car as she yelled to him to let her out. April G., Bridget's friend, only partly corroborated Bridget's version of this incident, testifying she saw defendant angrily try to pull Bridget out of a car and Bridget was scared, but she could not recall him driving

erratically. Bridget testified that on another occasion, as she tried to leave their residence, defendant grabbed and pushed her, causing her to fall, then he locked the doors. She was not hurt but was scared (and pregnant) during this incident. On a third occasion during an argument shortly after Bridget gave birth, defendant pushed her down onto a bed, pinned her, yelled at her, then put a hand on her neck. He also threatened to kill her.

Bridget was impeached by two purportedly inconsistent statements (introduced via a stipulation) that Bridget had told two different CPS social workers that she was not in an abusive relationship. A peace officer also testified that when she interviewed Bridget after she gave birth, Bridget named defendant as the father but did not mention any domestic violence.

Defendant correctly describes "extensive discussions" about the admissibility of the evidence pertaining to Bridget. But Bridget's evidence and the CPS stipulation did not take up very much of the *jury's* time during this lengthy trial, and it is the comparative amount of the jury's time taken on a particular issue that is the key inquiry for section 352 purposes.

We reject defendant's repeated claim that Bridget was an adult when her alleged abuse occurred. She did not turn 16 until shortly before she gave birth, and therefore each of the three incidents she described occurred when she was either 15 or 16. While we accept the point that Bridget (a teenager of childbearing years) stood in a different posture alongside defendant than did Cameron (a toddler), she was still a minor when the alleged acts occurred. The difference in age and relationship between her and Cameron went to the weight of any inference the jury might draw therefrom. But contrary to defendant's view, her testimony--if believed--described three concrete instances showing that defendant was quick to anger and capable of expressing his anger towards a loved one in a violent and threatening way. Further, at the relevant times defendant thought Bridget was pregnant with his own child. Therefore, Bridget's evidence was directly

probative of a live issue in the case, that is, whether defendant lost his temper and lashed out at the children left in his care. That is a valid purpose for domestic abuse evidence. (See *People v. Dallas* (2008) 165 Cal.App.4th 940, 951-957.) The evidence was not confusing or remote; nor was it inflammatory either of itself (particularly given Bridget's minimization of it and denial of suffering any physical injury) or in comparison to other evidence tending to show Cameron was violently assaulted.

Further, the jury was instructed that Bridget's evidence was relevant only if the jury found by a preponderance of the evidence that the acts described actually occurred. If so the jury could--but was not required to--conclude that "defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit" the charged offense. The instruction cautioned that this was "only one factor to consider along with all the other evidence," that it was not itself sufficient to convict, and that the People retained the burden to prove guilt beyond a reasonable doubt. The jury was also instructed not to use the evidence for any other purpose. During argument, the prosecutor emphasized that the purpose of Bridget's testimony was to show defendant's reaction (to use violence) when he became angry, and the jury could use that to explain what happened to Cameron. There is no claim that this instruction was inadequate or that the prosecutor's argument was misleading.

We conclude there was no error regarding admission of Bridget's testimony under section 1109.

IV

Prejudice

A. *Legal Standard*

The state-law *Watson* standard of prejudice applies when the error(s) involve the admission of uncharged act evidence. (See *People v. Megown* (2018) 28 Cal.App.5th 157, 167; *People v. Harris*, *supra*, 60 Cal.App.4th at p. 741.) The *Watson* standard

requires a defendant to show that there is a reasonable probability he would have obtained a better result at trial in the absence of the error(s). (*Watson, supra,* 46 Cal.2d at p. 836.)

Generally, "To determine what the 'jury is *likely* to have done in the absence of' [evidence that should have been excluded], we consider the relative strength of 'the evidence supporting the existing judgment' as compared to 'the evidence supporting a different outcome.' [Citation.]" (*People v. Jandres, supra,* 226 Cal.App.4th at p. 360.)

B. *Analysis*

The evidence against defendant was strong without the uncharged act evidence. Much of this evidence came from defendant. Before his arrest he told an officer that he "shook the shit" out of Cameron that night. He repeated that he both slapped and shook Cameron, and admitted that the child's head hit the floor. He thought he dropped Cameron while shaking him. Defendant also admitted he had inflicted "whoopin's" on the children, although he downplayed their severity. He had punched J. until Veronica told him to stop. His explanation for the child's severe and recent injuries was to blame Cameron's father who had not seen the boy for two months. Defendant also displayed a consciousness of guilt in telling his mother that he had said "too much" and that he was going to be in a lot of trouble. His own words provided damning evidence that he had been physically violent with Cameron that night. And since he admitted he had previously lied to the police, the jury could infer his actions were more egregious than he admitted. Defendant could not explain Cameron's cut lip or the bloody items found in different parts of the trailer.

In addition, there was evidence that defendant was frustrated in his role of full-time caregiver to two toddlers and that he was impatient with Cameron earlier that night.

While the testimony of the neighbors had some inconsistencies, they were facially neutral witnesses who described unusual noises during the general timeframe after the women had left for the gym. Their descriptions of those noises, a "loud slam," "some

screaming, fighting" or "arguing," and "some loud thuds" "like walls being banged against," and "kids crying" strongly corroborated the idea that defendant beat Cameron that night. The dents in the walls provided further corroboration.

Although there were competing medical explanations for Cameron's injuries, it is telling that *every doctor who actually examined Cameron or his tissue* concluded his injuries were not accidental but had been inflicted. As the prosecution argued, the defense experts' conclusion of rickets, pneumonia, and reperfusion did not account for all of Cameron's injuries, such as the bruising.

The properly admitted uncharged act evidence added to this already strong case. Evidence defendant may have given J. a black eye that night--an injury for which he had no explanation--implied that defendant was violent against the toddlers while the women were at the gym. Evidence that he was repeatedly violent against Bridget while she was pregnant suggested his tendency to fly into violent rages against vulnerable loved ones. The improperly admitted evidence was vague and inconclusive; it was less inflammatory than the properly admitted uncharged act evidence. It is not reasonably probable the improperly admitted uncharged act evidence carried much weight with the jury or tipped the scales in deciding the case. It added little to the properly admitted evidence.

On this record, it is not reasonably likely that exclusion of the inadmissible uncharged act evidence would have led to a better result. The evidentiary errors we have found were harmless.[5] (See *Watson, supra,* 46 Cal.2d at p. 836.)

---

[5] For the same reasons, we reject defendant's claim of cumulative error.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Mauro, J.